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No. 84-595

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALAN R. JAMPOL and
NOLAN F. KING,

Petitioners,

vs.

SOUTHERN CALIFORNIA RETAIL CLERKS
UNION AND DRUG EMPLOYER PENSION
AND TRUST FUND,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PARTIES

Respondent is the Southern California Drug Benefit Fund erroneously named in these proceedings as the Southern California Retail Clerks Union and Drug Employer Pension and Trust Fund.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Plaintiffs-Appellants below, George and Marjorie Malhiot, sought reimbursement for medical expenditures from the Southern California Drug Benefit Fund ("Trust Fund"), a multi-employer Taft-Hartley trust fund. The Trust Fund is

an employee benefit fund, organized and existing pursuant to § 302(c)(5) of the Labor-Management Relations Act [29 U.S.C. § 186(c)(5)] and is an employee benefit plan within the meaning of § 3(1) of the Employee Retirement Income Security Act ("ERISA") [29 U.S.C. § 1002(1)]. The administrator of the Trust Fund denied reimbursement for medical expenses incurred by George Malhiot before December 28, 1980 on the ground that he was not Marjorie Malhiot's legal spouse before that date.

Without even attempting to exhaust the administrative review process provided by the Trust Fund, pursuant to the requirements of ERISA, the Malhiots filed an action in the California Superior Court alleging violations of state insurance laws and ERISA, 29 U.S.C. § 1001 et seq. The Trust Fund removed the action to Federal District Court. The District

Court granted a stay to permit the Malhiots to administratively appeal the administrator's denial of their claim to the Trust Fund's Board of Trustees. The Trust Fund's Appeals Committee recommended that the Board of Trustees deny the appeal on the ground that the Malhiots were not legally married until December 28, 1980. Pursuant to the Trust Fund's Rules of Eligibility, only legal spouses are entitled to coverage. The Board of Trustees denied the Malhiots' appeal. (Appendix "A", pp.A-5-6)[1/]

The Trustees' decision was made pursuant to the Trust Fund's Rules of Eligibility based on the evidence before them and was legally correct. The District Court agreed and entered judgment for the

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1/ Appendices "A" through "C" referred to herein are attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Petitioners.

Trust Fund. The Malhiots filed a Motion for New Trial Or, In The Alternative, A Motion To Amend The Pre-Trial Order. The District Court denied both motions, noting that there was no "credible" evidence in support thereof. (Emphasis added.) (Appendix "D", p.D-2)

The Court of Appeals determined that the Malhiots' arguments on appeal were "wholly without merit" (Appendix "A", pp.A-16-17). The appellate court imposed sanctions on the Malhiots' counsel, Petitioners herein, pursuant to Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927. Thereafter, the Court of Appeals denied Appellants' Petition for Rehearing and Request for Hearing On Sanctions. (Appendix "C", p.A-27)

REASON FOR NOT GRANTING THE PETITION

In rendering its decision below, the Court of Appeals for the Ninth Circuit

fully considered and correctly determined that the particular facts in the record before it justified an award of sanctions against the Petitioners, the Malhiots' appellate counsel, without the necessity of prior formal notice and a hearing before the Court of Appeals.

I

The Record Before The Appellate Court Supported An Award Of Sanctions As A Matter Of Law.

Rule 38 of the Federal Rules of Appellate Procedure ("Rule 38"), provides:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

In its brief to the Ninth Circuit, the Trust Fund requested that it be awarded reasonable attorneys' fees because the Malhiots' appeal was frivo-

lous. Thus, Petitioners, appellate counsel for the Malhiots, were at least aware as of the time they received said brief that the Trust Fund was seeking an award of attorneys' fees for a frivolous appeal. However, appellate counsel should be presumed to be familiar with the Federal Rules of Appellate Procedure.

The appellate court has discretion to award damages and single or double costs as a sanction against bringing a frivolous appeal. Rule 38; 28 U.S.C. § 1912. This award may include attorneys' fees. Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981). An appeal in the Ninth Circuit is considered frivolous when the result is obvious or the appellant's arguments of error are fully without merit. McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981).

From a limited review of appellate cases, it does not appear that the impo-

sition of damages pursuant to Rule 38 has been seen by various appellate courts as first requiring notice and hearing before the appellate court. See, e.g., Acevedo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976); Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980); Reid v. U.S., 715 F.2d 1148 (7th Cir. 1983). The issue appears to be one which can, in many cases, be decided by the court of appeals as a matter of law based on the record before it. A Rule 38 determination, therefore, presents an issue for which no hearing, and thus no notice other than what has already been provided in the rules, should be required.

Rule 38 does not specifically indicate against whom damages may be awarded, that is, whether against the party, the party's counsel or both. In some cases it will be clear that it is appellate

counsel, rather than the party, who is responsible for the unreasonable prolongation of litigation and who is accordingly the proper person against whom to assess such damages as are provided by the Federal Rule. Acevedo, supra, 538 F.2d at 921; U.S. v. Potamkin Cadillac Corp., 697 F.2d 491 (2d Cir. 1983).

As of the time of their Reply Brief, appellants and their counsel were on notice that the Trust Fund was arguing that the appeal was frivolous and seeking an award of the attorneys' fees therefor. Appellants and their counsel forwent the opportunity at that time to dismiss the appeal and thus possibly avoiding an award of damages including attorney fees.

The Court of Appeals in this matter concluded that sanctions were appropriate under Rule 38 of the Federal Rules of Appellate Procedure alone. (Appendix "A",

p.A-17) The Court of Appeals then went on to examine the applicability of 28 U.S.C. § 1927 which provides, in pertinent part, as follows:

> "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

The imposition of sanctions under § 1927 requires a finding that counsel acted in bad faith, recklessly or that there was intentional misconduct by counsel. U.S. v. Blodgett, 709 F.2d 608 (9th Cir. 1983); Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982). The Court of Appeals, in its Opinion below, specifically made a finding that:

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> "Counsel's [referring to appellants' counsel, Petitioners herein] briefs to this court contain many misrepresentations of the record and an intentional misstatement of California law." (Appendix "A", p.A-18)

The reference to the intentional misstatement of California law is fully explained in the Ninth Circuit's Decision. (See Appendix "A", pp.A-9-11) The appellate court found the omission of the second sentence of the statute relied upon by the Malhiots' counsel to be crucial; so much so, that the Ninth Circuit quite easily equated what is clearly reckless conduct by appellate counsel as rising to the level of intentional misconduct, particularly when viewed in conjunction with the appellate court's determination that the Petitioners made material misrepresentations of the record as well. (See, e.g., Appendix "A", pp.A-12-13) In the present context, the

concepts of bad faith, intentional misstatements or reckless conduct are interchangeable.

In this case, the appellate court awarded Respondent damages of $1,500.00, which included costs and attorneys' fees. The actual attorneys' fees and costs incurred by Respondent are more than double this amount. The sum awarded has and will continue to be effectively reduced by legal proceedings in this Court on an issue which is of no direct concern to the Respondent Trust Fund, and the very reason Respondent originally waived its right to oppose the Petition.

Boiled down to its simplest state, Petitioners' sole complaint is limited to a single word in the appellate court's opinion that Petitioners made "many misrepresentations of the record and an intentional misstatement of California law." (Emphasis added.) Whether or not

there is a distinction in substance between an "intentional misstatement" as opposed to a "reckless misstatement", it would not have changed the appellate court's thinking on the attorneys' fees issue nor required a different result. The appellate court's ultimate conclusion is supported by findings found in its Opinion. The findings are based on matters which were otherwise all of record in the appellate court's files.

Petitioners have asked the Court to grant the Writ apparently claiming only that the word "intentional" in the appellate court's Opinion was not justified without first according Petitioners procedural due process. However, even that assessment of Petitioners' conduct could properly have been made on the basis of the record presented to the Court of Appeals. Nothing is to be gained by providing Petitioners any additional notice

or opportunity to be heard on this matter. Granting the Petition would be prejudicial to the administration of justice because it would only further squander valuable court time on a case that should have disappeared from court dockets long ago. The behavior here attributed to appellate counsel is an extremely rare case, but one which was fully documented in records already before the appellate court at the time of its decision. See, e.g., Reid, supra, 715 F.2d at 1155 fn.9. Thus, Petitioners' argument herein is again without merit, whether or not the Court of Appeals might more appropriately have used the word "reckless" as opposed to "intentional" to describe Petitioners' conduct.

CONCLUSION

For the above reasons, the Petition should be denied. Respondent respectfully requests an award for attorneys'

fees incurred in responding to the Petition pursuant to 28 U.S.C. § 1912.

Respectfully submitted,

STUART LIBICKI
Schwartz, Steinsapir,
Dohrmann & Sommers

By Stuart Libicki
STUART LIBICKI
Attorneys for
Respondent

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEORGE J. MALHIOT, MARJORIE M. MALHIOT, Plaintiffs, v. SOUTHERN CALIFORNIA RETAIL CLERKS UNION and DRUG EMPLOYER PENSION AND TRUST FUND; DAVID L. MAUSS, ADMINISTRATOR; THRIFTY DRUG STORES, INC., Defendants.	Case No. CV 81-4414-CHH ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL

This matter is before the Court on plaintiffs' motion for a new trial pursuant to Fed. R. Civ. P, 59(a) or, in the alternative, for relief pursuant to Fed. R. Civ. P. 60(b). The Court has considered the points and authorities submitted by the parties, the entire record of the action, and the oral argument of counsel.

IT IS HEREBY ORDERED that plaintiffs' motion is denied. This Order is based upon the following considerations:

1. Plaintiffs' claim for relief pursuant to Fed. R. Civ. P. 60(b) is based on the contention that a stipulation contained in the Pre-Trial Conference Order, ¶ 6(4), is erroneous. There is not, however, any credible evidence supporting the contention that this was a "typographical error," nor is there any support for plaintiffs' contention that they began living together on September 1, 1967. Plaintiffs are not entitled to relief under Rule 60(b).

2. Even if the evidence were to show that plaintiffs began living together on or before February 14, 1968, they would not be entitled to judgment in this action. The decisions of the trustees of the defendant Pension and Trust Fund may be reversed only if "arbitrary and capricious or made in bad faith, not supported by substanial evidence, or erroneous on a question of law." Rehmar v.

Smith, 555 F.2d 1362, 1371 (9th Cir. 1976). The trustees were not presented with evidence establishing that plaintiffs were legally married, pursuant to the provisions of former Civil Code §§ 55 and 79. Regardless of whether plaintiffs could prove, in a de novo trial, that they were legally married in 1968 by virtue of Civil Code § 79, they have not satisfied the "arbitrary and capricious" standard required to warrant reversal of the trustees' decision.

DATED: May 26, 1983

/s/
Cynthia Holcomb Hall
United States
District Judge

No. 84-595

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Petitioners,

vs.

SOUTHERN CALIFORNIA RETAIL CLERKS UNION AND DRUG EMPLOYER PENSION AND TRUST FUND,

Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

GEORGETTE ZALOOM, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the within entitled action. My business address is 3435 Wilshire Boulevard, Suite 2950, Los Angeles, California 90010. On December 18, 1984, I served the within Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the Petitioners in said action by placing three true copies thereof enclosed in a sealed envelope with priority postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, the envelope addressed as follows:

Edward L. Lascher, Esq.
605 Poli Street
Ventura, CA 93002

That affiant makes this service for Stuart Libicki, Attorney for Respondents herein. That there is delivery service by United States mail at the place so addressed or there is a regular communication by mail between the place of mailing and the place so addressed.

Georgette Zaloom
GEORGETTE ZALOOM

On December 18, 1984, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Georgette Zaloom, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
DIANE ROSS
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Exp Sept 14, 1988

Diane Ross
Notary Public in and for said
County and State

BEST AVAILABLE COPY